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QUESTIONS PRESENTED

1. Whether otherwise privileged attorney-client communications are subject to district court review upon the mere invocation of the crime-fraud exception and in the absence of independent evidence of either a crime or fraud or that attorney-client communications were in furtherance thereof.

2. Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, a district court may issue a protective order prohibiting the IRS from violating 26 U.S.C. § 6103 by disclosing summoned information to Department of Justice attorneys who are defending the government in non-tax civil litigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-40

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FRANK S. ZOLIN, CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

In addition to the opinions cited in the Brief for the United States, the opinion of Norris, J., concurring in the order of the *en banc* court (Resp. App. 1a-2a), is reported at 850 F.2d 610.

STATEMENT OF THE CASE

This case arises from the efforts of the Internal Revenue Service to obtain thirteen documents or tapes held under seal by the Clerk of the California Superior Court for Los Angeles County following a civil trial. The courts below denied the government access to eight items on various grounds. Of relevance

here are tape recordings (the "MCCS tapes") of meetings between Church of Scientology of California (hereinafter "the Church") representatives and legal counsel, production of which were denied on the ground that the tapes are protected by the attorney-client privilege (Pet. App. 28a). The courts below enforced the summons with respect to five documents, but ordered that these five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a).

1. In July 1984, the Criminal Investigation Division of the Los Angeles District Director's Office of the IRS commenced a tax investigation of L. Ron Hubbard. On October 24, 1984, the IRS served an administrative summons upon the County Clerk for Los Angeles County, who also serves as Clerk for the California Superior Court for Los Angeles County, seeking production of numerous exhibits which were contained in the record of a pending Superior Court action entitled *Church of Scientology of California* v. *Armstrong* (No. C420153), and which remained under seal in the custody of the Clerk. The Clerk produced some of the documents, but refused to produce thirteen documents which the Superior Court had sealed on various grounds, including attorney-client privilege, marital privilege, and privacy (Pet. App. 12a).

On January 18, 1985, the government commenced this proceeding by filing a petition to enforce the summons. The Church and Mrs. Hubbard intervened in the district court to oppose enforcement of the summons on two grounds relevant here: (1) that the MCCS tapes are protected by the attorney-client privilege; and (2) that the summons had been issued for collateral purposes, *i.e.*, gathering information for use by other government agencies (Pet. App. 12a).

2. With respect to the MCCS tapes, as set forth more fully in Respondents' Brief in Opposition to the Petition For Writ of Certiorari, at 3-5, the Church established by declarations all the prerequisites of the attorney-client privilege. The government

asserted that the crime-fraud exception to the privilege applied and referred the court to excerpts from the tapes contained in the Declaration of Gerald Armstrong, dated September 6, 1984, and filed in an unrelated proceeding. While the district court had under consideration the Church's claim that the exception must be proved by independent evidence, the government submitted *sua sponte* a seventeen-page single-spaced transcript of the tapes. The district court then considered the transcripts and excerpts to determine whether the government had established the crime-fraud exception, and concluded that it had failed to do so (Pet. App. 28a). The district court specifically asked government counsel to "point out where I went wrong," and if there was "anything else you want to point to," to which government counsel replied negatively (April 30, 1985 Transcript of Proceedings, at 73, 80). During that hearing, the government never suggested that the court should or must go beyond the excerpts and transcripts and listen to the tapes themselves. The court subsequently denied the government's motion for reconsideration, which was based on an *ex parte in camera* affidavit and a request that the court listen to the tapes. The court held that the affidavit was untimely and that the government had waived its initial request that the court review the tapes (Pet. App. 25a-26a; J.A. 64).

3. The district court did hold that five of the thirteen documents sought by the government were relevant to the tax years under investigation and that any privileges had been waived (Pet. App. 28a). Prior to enforcing the summons as to the five documents, however, the district court held an evidentiary hearing on the good faith of the government. At the hearing, the Church adduced substantial evidence of coordination between the IRS agents responsible for issuing the summons and Justice Department attorneys representing the government in two civil rights actions brought by the Church against various governmental agencies and their employees, *Church of Scientology of California* v. *Linberg*, No. 77-2654 (C.D.Cal.) and *Founding Church of Scientology Inc.* v. *Director, Federal Bureau of Investigation*, No. 98-0107 (D.D.C.). The Church demonstrated that as part of its investigation of Mr. Hubbard the IRS

had summoned two witnesses and arranged to interview them in a hotel in Ventura, California, at which time government attorneys in the *Linberg* action were also present and reportedly interviewed the witnesses (Declaration of Donald C. Randolph in Support of Intervenor's Request for Discovery, at 10-11). The witnesses subsequently testified that they had spoken with the *Linberg* attorneys, one of whom was also an FBI agent, because they believed the IRS's summons compelled them to do so (September 20, 1984 Deposition of Diana Sue Reisdorf-Voegeding, at 5; September 21, 1984 Deposition of John Nelson, at 22-23, 39-40). Further, in the same time period in which the IRS issued the summons at issue here, government counsel in the *Founding Church* case filed a motion in the Superior Court seeking many of the same documents sought by the IRS's summons. IRS Agent Xanthos acknowledged that he had spoken with the government attorneys in the *Founding Church* case and discussed the sealed documents held by the Superior Court and how to obtain access to them (April 29, 1985 Transcript of Proceedings, at 36-37). He then put the government attorneys "in touch with my counsel" to discuss "what would be the best vehicle to make a motion with the Superior Court." (*Id.* at 37-38). Subsequently, his attorney did speak with the government attorneys, although Agent Xanthos, the only agent the court permitted the Church to examine, had no knowledge of the substance of those conversations (*Id.* at 38). Shortly after his conversations with government counsel, however, the IRS issued its summons. Finally, Agent Xanthos also acknowledged that another IRS Agent had had subsequent conversations with government counsel in the *Linberg* action (*Id.* at 29-30).

The District Court found that the IRS was in good faith conducting a criminal tax investigation of Mr. Hubbard and therefore enforced the summons as to relevant and non-privileged documents. It nonetheless considered the case *sui generis* because of the many non-tax related civil litigations between the government and the Church and because of its concern, undoubtedly founded on the evidence adduced by the Church, that "information acquired for one purpose may be in effect used for civil discovery in the other." (J.A. 67). Accordingly, it

issued a protective order requiring that the five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 19a). The court emphasized that as long as an intended disclosure was authorized by 26 U.S.C. § 6103, it would be permitted (J.A. 60, 66, 68).

4. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment (Pet. App. 11a-24a). The panel held that the district court order requiring that the IRS not deliver the five documents to any other government agency unless criminal tax prosecution is sought or a court order is obtained was an appropriate exercise of the district court's discretion. The panel reasoned that since the government had invoked the court's process to enforce the summons, the court had the power and authority to prevent its process from being abused. The panel rejected the government's argument that the order ran afoul of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), relying on the decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1526 (9th Cir. 1986), where the court reasoned that "restricting disclosure of summoned information to other agencies only to the extent that a court order is necessary, does not restrain the assessment or collection of tax liability." (Pet. App. 19a).

The panel affirmed the rulings of the district court with respect to the MCCS tapes. The panel applied the holding of *United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972), that before the privileged status of the communications is lifted on the basis of the crime-fraud exception, the government must first make a *prima facie* showing independently of the communications of an ongoing crime or fraud (Pet. App. 21a-23a). The panel then reviewed the government's evidence and held that it was "not sufficient to make out the requisite prima facie showing of intended illegality." (Pet. App. 24a).

Thereafter, the government petitioned for rehearing and suggested rehearing *en banc* on both the order limiting disclosure to other agencies and the independent evidence rule, asserting

an intra-circuit conflict on the latter question between *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), and *Shewfelt*, *supra*. On November 6, 1987, the petition for rehearing *en banc* was granted (Pet. App. 10a). Briefing and oral argument were limited to the crime-fraud exception issue (J.A. 9-10).

On March 28, 1988, the *en banc* court filed an order vacating the November 6, 1987 order granting *en banc* review as improvidently granted because it concluded there was no conflict between the panel decisions in *Shewfelt* and *Friedman* (Pet. App. 1a-2a). The *en banc* court ordered that the portion of the panel opinion that questioned whether *Shewfelt* should be reviewed *en banc* be withdrawn and, "in all other respects," that the panel opinion remain intact (Pet. App. 2a). The *en banc* court also reformulated the independent evidence rule as stated in *Shewfelt* and by the panel: "The government must make a *prima facie* showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality." (Pet. App. at 2a).

Three members of the *en banc* court dissented from the order vacating the November 6, 1987 order, but stated that they nevertheless would affirm the district court (Pet. App. 2a-9a.) The dissenters would have created a rule that would "make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure." (Pet. App. 9a). The dissenters would have affirmed because the district court did not abuse its discretion in rejecting the crime-fraud exception based on the partial transcripts. The dissent also found that the district court did not abuse its discretion in considering only the transcripts initially submitted by the government and in not considering the material submitted for the first time on reconsideration (Pet. App. 9a).[1]

1 In a separate concurrence filed several months later, Judge Norris found it procedurally unclear whether the *en banc* order was a disposition on the merits and opined that if so, it is internally inconsistent because the *en banc* court cannot both decide a case on the merits and vacate its order granting *en banc* review. Nonetheless, the concurrence agreed that the independent evidence rule should be the law (Resp. App. 1a-2a).

SUMMARY OF ARGUMENT

I.

The attorney-client privilege, by encouraging full and frank communication between attorneys and clients, serves vital interests in a society ruled by law. Nevertheless, the privilege must give way when the opponent of the privilege establishes a *prima facie* case that the communications are in furtherance of intended illegality. The issue here is how the *prima facie* case may be shown without damaging the values served by the privilege and without overburderning judicial resources by unnecessarily forcing extensive review of otherwise privileged communications.

The government takes the position that mere invocation of the crime-fraud exception suffices to obtain judicial review of the communications. Yet the government would apparently leave to the standardless discretion of the district courts the determination of when the communications should be reviewed, thereby creating the sort of uncertainty in the privilege that this Court has condemned. Unsurprisingly, few, if any, courts have followed the route suggested by the government. Indeed, it is the government's position that may more accurately be characterized as "maverick." Rather, most courts have employed in practice a rule that requires the privilege's opponent to proffer independent evidence that the crime-fraud exception applies before the court will devote its resources to review of the communications. This rule has generally taken one of two forms, exemplified by the two rulings of the court of appeals below: 1) requiring independent evidence both of a crime or fraud *and* that the communications furthered the illegality, *see Zolin*, 842 F.2d 1135, 1136 (Pet. App. 2a) (*en banc* order); or 2) requiring independent evidence only of the crime or fraud, *see Zolin*, 809 F.2d 1411, 1418 (Pet. App. 21a) (panel

opinion). Courts have routinely permitted *in camera* review *after* a determination that one or the other standard has been met as a means to prevent overbroad disclosure of attorney-client communications.

The panel opinion below, which followed the second version of the independent evidence rule set forth above, found insufficient evidence to make out even a *prima facie* case of intended illegality. Therefore, respondents must prevail under either version of the rule.

II.

A. The government urges this Court to impose an extraordinary limitation on the authority of the district courts in summons enforcement proceedings. According to the government, a court may only enforce or deny enforcement of a summons. It may not, as the district court did here, enforce the summons and issue a protective order prohibiting the IRS from violating 26 U.S.C. § 6103 by disclosing the very material summoned in ways wholly unrelated to its tax investigation.

This all or nothing approach is inconsistent with the inherent power of the federal courts to prevent their process from being abused. Congress expressly recognized this power by providing in 26 U.S.C. § 7604(a) that district courts have jurisdiction "by appropriate process" to enforce IRS summonses, and this Court, in its seminal decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), instructed the courts to be vigilant in summons enforcement proceedings to prevent abuses of their process. Among the abuses which courts have long recognized is the improper disclosure of confidential information obtained through invocation of their process. Courts routinely issue protective orders in discovery proceedings and in administrative subpoena enforcement proceedings to ensure that information obtained through their process is not improperly disclosed.

The government's all or nothing approach also forces a court to make an unnecessary choice between denying enforcement of a summons despite the government's interest in unpaid taxes or enforcing a summons despite the violation of the taxpayer's

confidentiality which will result. There is no reason for sacrificing either of these interests since the issuance of a protective order can accommodate both.

B. The government relies on the presumption against imposing restrictions on the IRS's summons power in the absence of an unambiguous congressional directive. Section 6103, however, is precisely such an unambiguous congressional directive. It reflects Congress' broad judgment that, except in narrowly delineated circumstances, the IRS should not disclose tax information, including information obtained through the summons power. Furthermore, this Court has repeatedly recognized that the presumption's underlying concern is that the IRS have those powers necessary for the effective enforcement of the tax laws. It is therefore inapposite here. The purpose of the district court's order was to ensure that the IRS not disclose the summoned records to Department of Justice attorneys representing the government in non-tax civil litigation with the Church. These disclosures would clearly have violated § 6103(a) and were unrelated to the IRS's tax investigation. Thus, the protective order could not have hampered the IRS's investigation.

Nor would litigation over the appropriateness of protective orders unduly burden summons enforcement proceedings. Taxpayers resisting enforcement of a summons ordinarily submit at the outset all available evidence of past or intended unlawful disclosures to demonstrate the IRS's bad faith. Thus, ruling on the appropriateness of a protective order would not require the submission of additional evidence. The district courts, morever, are armed with summary procedures designed to ferret out unmeritorious taxpayer claims and prevent unnecessary delay.

C. The government also relies on Congress' failure to provide expressly for injunctive relief against disclosures which violate § 6103. Whether or not injunctive relief is available, however, is entirely irrelevant. A protective order is not an injunction under the Federal Rules of Civil Procedure or the statutes of the United States. It is issued against the party invoking the court's process in order to prevent the court's process from being abused. Section 6103, moreover, merely sets

opinion). Courts have routinely permitted *in camera* review *after* a determination that one or the other standard has been met as a means to prevent overbroad disclosure of attorney-client communications.

The panel opinion below, which followed the second version of the independent evidence rule set forth above, found insufficient evidence to make out even a *prima facie* case of intended illegality. Therefore, respondents must prevail under either version of the rule.

II.

A. The government urges this Court to impose an extraordinary limitation on the authority of the district courts in summons enforcement proceedings. According to the government, a court may only enforce or deny enforcement of a summons. It may not, as the district court did here, enforce the summons and issue a protective order prohibiting the IRS from violating 26 U.S.C. § 6103 by disclosing the very material summoned in ways wholly unrelated to its tax investigation.

This all or nothing approach is inconsistent with the inherent power of the federal courts to prevent their process from being abused. Congress expressly recognized this power by providing in 26 U.S.C. § 7604(a) that district courts have jurisdiction "by appropriate process" to enforce IRS summonses, and this Court, in its seminal decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), instructed the courts to be vigilant in summons enforcement proceedings to prevent abuses of their process. Among the abuses which courts have long recognized is the improper disclosure of confidential information obtained through invocation of their process. Courts routinely issue protective orders in discovery proceedings and in administrative subpoena enforcement proceedings to ensure that information obtained through their process is not improperly disclosed.

The government's all or nothing approach also forces a court to make an unnecessary choice between denying enforcement of a summons despite the government's interest in unpaid taxes or enforcing a summons despite the violation of the taxpayer's

confidentiality which will result. There is no reason for sacrificing either of these interests since the issuance of a protective order can accommodate both.

B. The government relies on the presumption against imposing restrictions on the IRS's summons power in the absence of an unambiguous congressional directive. Section 6103, however, is precisely such an unambiguous congressional directive. It reflects Congress' broad judgment that, except in narrowly delineated circumstances, the IRS should not disclose tax information, including information obtained through the summons power. Furthermore, this Court has repeatedly recognized that the presumption's underlying concern is that the IRS have those powers necessary for the effective enforcement of the tax laws. It is therefore inapposite here. The purpose of the district court's order was to ensure that the IRS not disclose the summoned records to Department of Justice attorneys representing the government in non-tax civil litigation with the Church. These disclosures would clearly have violated § 6103(a) and were unrelated to the IRS's tax investigation. Thus, the protective order could not have hampered the IRS's investigation.

Nor would litigation over the appropriateness of protective orders unduly burden summons enforcement proceedings. Taxpayers resisting enforcement of a summons ordinarily submit at the outset all available evidence of past or intended unlawful disclosures to demonstrate the IRS's bad faith. Thus, ruling on the appropriateness of a protective order would not require the submission of additional evidence. The district courts, morever, are armed with summary procedures designed to ferret out unmeritorious taxpayer claims and prevent unnecessary delay.

C. The government also relies on Congress' failure to provide expressly for injunctive relief against disclosures which violate § 6103. Whether or not injunctive relief is available, however, is entirely irrelevant. A protective order is not an injunction under the Federal Rules of Civil Procedure or the statutes of the United States. It is issued against the party invoking the court's process in order to prevent the court's process from being abused. Section 6103, moreover, merely sets

forth the substantive rules governing disclosure. It would be extraordinary had Congress intended to oust the courts of the fundamental and inherent power to prevent their process from being abused without any express indication of its intent.

Furthermore, although it is unnecessary to reach the issue here, Congress did contemplate that predisclosure relief would be available to prevent violations of § 6103. Injunctive relief would clearly further the legislative purpose to protect the confidentiality of tax information, and Congress nowhere indicated that the statutory post-disclosure remedies were intended to be exclusive. In any event, predisclosure judicial review is available under the Administrative Procedure Act, 5 U.S.C. §§ 701-06.

ARGUMENT

I.

AN INDEPENDENT EVIDENCE RULE, FOLLOWED IN PRACTICE BY NUMEROUS FEDERAL COURTS, BALANCES THE EFFICIENT USE OF JUDICIAL RESOURCES AND THE VITAL INTERESTS SERVED BY THE ATTORNEY-CLIENT PRIVILEGE WITH SOCIETY'S INTEREST IN PREVENTING ABUSE OF THAT PRIVILEGE

A. Only An Independent Evidence Requirement Prior To Judicial Examination of Otherwise Privileged Attorney-Client Communications Can Balance The Interests at Stake

As the government notes, the attorney-client privilege is the oldest of the confidential communications privileges recognized at common law. *See* 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). These vital interests can be served only if individuals and organizations are able to obtain "the aid of persons having knowledge

of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id.* (quoting *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888)); *see Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Indeed, "the attorney-client privilege is central to the legal system and the adversary process. For these reasons, the privilege may deserve unique protection in the courts." *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977).

The courts have long recognized that the privilege does not extend to a client's communications with an attorney that are designed to perpetrate present or future crime or fraud. *See, e.g., Clark* v. *United States*, 289 U.S. 1, 15 (1933).[2] However, otherwise privileged communications can be stripped of that confidential status only when the opponent of the privilege makes out a *prima facie* case that the communications were made in the furtherance of a future or ongoing crime or fraud. *See, e.g., id.* at 15; *In Re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987). Indeed, all courts since *Clark* have recognized the need for a *prima facie* showing prior to the removal of the privilege.[3]

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2 It is equally well-settled that the crime-fraud exception does not apply to communications concerning past acts; such consultations, often made to insure that future acts are in compliance with law, lie at the heart of the privilege. *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986). Here, the district court, after examining the government's transcripts of the communications themselves, found that the submissions at most tended to show or admit past fraud (Pet. App. 28a).

3 The government does not challenge here the ruling of the courts below that the disputed communications otherwise qualify as attorney-client privileged communications. Thus, the burden has shifted to the government to make the requisite *prima facie* showing. *See, e.g., Antitrust Grand Jury*, 805 F.2d at 164. Nevertheless, the government asserts that "it must be assumed at this stage of the litigation that the MCCS tapes . . . are outside the scope of the attorney-client privilege." Gov't Br. at 41-42. However, the government failed to meet its burden before both the district court, which carefully considered the transcripts of the communications, and the Court of Appeals, which examined the independent evidence of alleged ongoing crime

Thus, the only issue before this Court is how the opponent of the privilege may make this *prima facie* showing. The clear thrust of the government's position, both in the lower courts and implicitly in this Court, is that mere invocation of the crime-fraud exception should result in judicial review in virtually all cases in which the opponent seeks such review (Gov't Br. at 44-45). This rule would chill attorney-client communications, would put enormous strain on judicial resources, and would drastically alter the balance between disclosure and privilege struck by most courts that have considered the issue.

When confronted with the broad implications of a rule that would *require in camera* review of often extensive communications upon the mere incantation of the magic words "crime or fraud," the government retreats to a position of studied ambiguity. The government disclaims an intent to argue for "an absolute requirement for review" (Reply Brief for United States in Support of Petition for Writ of Certioriari at 9 n.7; Gov't Br. at 42-43 n.23), but it provides no guidance for evaluating when assertions of the crime-fraud exception should lead to *in camera* review of the disputed communications. The government's inability to articulate an alternative standard is logically inevitable; either the district court must *always* review the communciations, or it may do so only when the opponent of the privilege meets some threshold level of independent evidence, or it must be given unbridled and standardless discretion to review the communications when it chooses. Having pulled back from the untenable first option, and having rejected the second option, the government in effect argues for standardless discretion.[4] But by replacing the independent evidence rule with a standard-

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or fraud. Thus, the presumption at this stage must be that the conversations are privileged and that the crime-fraud exception does not apply. Moreover, contrary to the government's assertion, neither the panel opinion nor the *en banc* order "assumed arguendo that the government's submissions" had established the necessary *prima facie* case. Gov't Br. at 42.

4 Similarly, the *en banc* dissent below would leave the decision to the district courts without any standards or requirement of a threshold showing: "[a] district court . . . would decide for itself whether a given case warrants . . . in camera review according to the circumstances." (Pet. App. 6a).

less discretion in the district court to invoke *in camera* review, the government would create precisely the sort of uncertainty in the privilege which "results in widely varying applications by the courts" and which this Court condemned as "little better than no privilege at all." *Upjohn Co.*, 449 U.S. at 393.

The kinds of problems confronted by attorneys that led the Court in *Upjohn* to reject the uncertain and narrow "control group test," 449 U.S. at 392-93, are common to many of the situations in which the crime-fraud exception issue arises. Corporations and other institutions that seek legal advice in order to structure their affairs to comply with complex tax and other rules, as well as to defend against allegedly improper past conduct, must be assured that their communications will remain confidential, even from the court, absent some extrinsic evidence that they are actually engaged in wrongdoing. If clients are instructed by their attorneys that their communciations may be reviewed by judges even absent extrinsic proof of crime or fraud, many undoubtedly will be unwilling to engage in the open and frank discussions of past actions and the exploration of possible future acts (including determination of whether such acts would be lawful) which the attorney-client privilege is intended to encourage and protect.

Accordingly, before a court should review the otherwise privileged communications themselves, the opponent of the privilege should be required to produce evidence, independent of the communications themselves, to indicate that the privileged communications were in furtherance of a crime or fraud. Alternatively, the privilege's opponent must demonstrate by independent evidence that there is at least an ongoing crime or fraud. Either of these threshhold standards are logical and practical means by which to balance the need to preserve attorney-client confidences and judicial resources against the proper refusal to grant privileged status to communications in furtherance of crime or fraud.

Most courts have, *sub silentio*, applied some version of the independent evidence rule before undertaking to review or require release of the privileged communications. *See* Part I C,

infra. Contrary to the government's assertions, the rulings below are in no way "maverick." Indeed, it has been the exceptional case in which a court has undertaken to review the privileged communications without first satisfying itself that the opponent of the privilege has produced some independent evidence to support its assertions.

B. An Independent Evidence Rule Does Not Preclude *In Camera* Review Of Privilege Claims

It is simply untrue that an independent evidence rule "is clearly an absolute bar to any consideration by the district court of the contents of the communication itself." (Gov't Br. at 42 n.23). An independent evidence rule requires only that there be some evidence to support the allegations of crime or fraud before an attorney must open his files and before the court must undertake the laborious process of reviewing what may often be massive quantities of documents. Indeed, as set forth, *infra*, Part I C, many courts have found *in camera* review mandatory before permitting release of particular communications in order to ensure that they are in fact within the scope of the crime-fraud exception.

The government's reliance upon several cases that reviewed documents *in camera* to determine a *proponent's* claims of attorney-client privilege are irrelevant to the propriety of the independent evidence rule.[5] Each of these cases involved the question whether the proponent of the attorney-client privilege satisfied his burden of establishing all essential elements of the privilege. None involved any question related to the crime-fraud exception. In each of these cases, the party claiming the privilege submitted the documents for *in camera* review in an attempt to meet its burden of establishing the elements of the privilege. Respondents do not assert that if the *proponent* of the

5 The government cites to *Hodges, Grant & Kaufman* v. *United States*, 768 F.2d 719 (5th Cir. 1985); *United States* v. *Lawless*, 709 F.2d 485 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); and *United States* v. *Osborn*, 561 F.2d 1334 (9th Cir. 1977). Gov't Br. at 44-45.

privilege is able to sustain its burden only by submitting the communications to the court, the court may not then consider the same communications to determine if the opponent of the privilege has established that the crime-fraud exception applies.[6]

But here, respondents established their entitlement to the privilege by declarations, without the necessity of presenting the communications to the court. The issue now is whether the opponent of the privilege is entitled to judicial review of previously unreviewed communications determined to be privileged upon the mere assertion that the crime-fraud exception applies.

C. Experience Has Shown An Independent Evidence Rule To Be An Effective Means Of Balancing The Competing Interests At Stake

Many of the courts that have considered the crime-fraud exception have explicitly or implicitly applied a two-part analysis to the showing required to invoke the crime-fraud exception. As stated by one court:

> the government must first make a prima facie showing of a violation sufficiently serious to defeat the privilege, and second, establish some relationship between the communication at issue and the prima facie violation.

6 *Kerr* v. *United States District Court*, 426 U.S. 394 (1976), is also inapposite. That case involved a claim of *qualified* governmental privilege that could be outweighed by the plaintiffs' need for the documents, and a claim of irrelevancy. *Id.* at 405. The *in camera* review suggested by this Court in *dictum* would have permitted resolution of the irrelevancy issue and the balance to be struck between privilege and need. Thus, *in camera* review would determine whether the proponent had established its right to a qualified privilege. By contrast, no showing of need can overcome the attorney-client privilege. *See* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 359 (4th ed. 1986).

Similarly, in *United States v. Nixon*, 418 U.S. 683 (1974), the court recognized only a qualified Presidential privilege that may be outweighed by "the legitimate needs of the judicial process." *Id.* at 707. *In camera* review was ordered only after "the Special Prosecutor had made a sufficient showing to rebut the presumption" of privilege. *Id.* at 713-14. The Court then detailed the importance of careful *in camera* review to protect the Presidential privilege against overbroad disclosure. *Id.* at 714-16.

In Re Sealed Case, 754 F.2d 395, 399 (D.C.Cir. 1985) (footnote omitted). Numerous courts have reviewed only independent evidence to determine if a *prima facie* case has been made as to both parts. This method of analysis is consistent with the position taken by the *en banc* court below. "[T]he government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality." *Zolin*, 842 F.2d at 1136 (Pet. App. 2a). Only after such a showing have the courts reviewed the particular communications to ensure that they fall within the exception.

Other courts have relied on independent evidence to establish the first prong—a *prima facie* case of crime or fraud—and only then have they reviewed the communications to determine if the second prong was met—that the communications were in furtherance of the crime or fraud. This position corresponds closely to that taken in *Shewfelt* and by the panel below. " '[B]efore the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications.' " 809 F.2d at 1418 (Pet. App. 21a) (quoting *Shewfelt*, 455 F.2d at 840) (emphasis added in *Zolin*). In *Shewfelt*, the government established a *prima facie* case of intended illegality and the communications were reviewed. 455 F.2d at 840.

These cases, discussed *infra*, which require that one or both prongs of the crime-fraud analysis be satisfied by independent evidence, demonstrate that the Ninth Circuit's position is well within the mainstream of actual judicial practice and experience. The cases also refute the government's primary argument against the independent evidence rule: that the rule makes it extremely difficult, if not impossible, for the opponent of the privilege to invoke the crime-fraud exception. On the contrary, in many of these cases, the government was able to establish by independent evidence not only a *prima facie* case of crime or fraud, but also that the attorney-client communications were in furtherance thereof.[7]

7 Moreover, the government's approach to the attorney-client privilege simply ignores the fundamental reality of privilege law that every privilege creates a potential for loss of unprivileged, relevant evidence. The function of the federal courts under Fed. R. Evid. 501 is to strike a careful balance between disclosure rules and the values that the privilege protects.

Experience shows that the independent evidence rule rarely, if ever, hinders a prosecutor's efforts to make a *prima facie* case that would vitiate the privilege. The rule simply requires that the government engage in its usual investigative activities, including convening grand juries and issuing subpoenas for material unrelated to attorney-client communications, rather than attempting in the first instance to uncover an alleged crime or fraud by breaching the confidential attorney-client relationship. At the same time, the rule strikes a reasonable balance in protecting judicial resources from the mere invocation of the crime-fraud exception and prevents wholesale exposure to the court of the entire attorney-client relationship. Any lesser standard would unduly burden the courts and lead to overexposure of privileged communications.

Even *in camera* review itself chills attorney-client communications, speculation of the *en banc* dissent to the contrary notwithstanding. *Zolin*, 842 F.2d at 1137-38 (Pet. App. 5a-6a). It is unrealistic to believe that clients in need of legitimate advice on highly sensitive topics would distinguish between revelations to the court and to the government, particularly if informed by conscientious counsel that in the event of even an unsupported allegation of the crime-fraud exception, all attorney-client communications must be turned over to the court for review. Moreover, exposure to the entirety of frank attorney-client communications, even if the court determined that all remained privileged, would in some cases strongly influence the court's attitude towards the client, especially in non-jury cases.[8]

8 A procedure in which *in camera* review was carried out by a judge or magistrate otherwise unconnected to the case would only multiply the strain on judicial resources that the government's position would create. Moreover, even if one presumes that the government will be prudent in seeking attorney-client disclosures *in camera*, one cannot reasonably make the same prediction with respect to private civil litigation, where the crime-fraud exception applies with equal force. *See, e.g., Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277 (8th Cir. 1984).

1. Numerous Courts Have Relied Solely upon Independent Evidence to Analyze the Crime-Fraud Exception

The rule enunciated by the *en banc* court below, under which both prongs of the crime-fraud exception are to be satisfied by independent evidence, has been followed in practice by many courts. While these cases do not explicitly adopt an independent evidence rule, they show that such a rule is a workable means of analyzing the crime-fraud exception, and that the rule is within the mainstream of judicial experience.

For example, in *In Re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987), the court relied exclusively upon independent evidence to resolve both prongs of its explicit two-part inquiry. *Id.* at 1226-27. Only after finding the privilege inapplicable based on the independent evidence both of a crime and fraud and of attorney-client communications in furtherance thereof, did the court affirm the district court's order that "permits [the attorney] to submit to the court for an *in camera* review any documents he believes remain privileged." *Id.* at 1228. Thus, *in camera* review was used to *protect* the privilege from overbroad disclosure *after* the exception was found applicable, but was not used to determine the applicability of the exception.

Again, in *In Re Sealed Case*, 754 F.2d 395 (D.C.Cir. 1985), the court relied exclusively on independent evidence to find the government had made a *prima facie* showing of ongoing crime and fraud. *Id.* at 398, 400.[9] The court then relied upon the same independent evidence to determine that counsel's representation was in furtherance of the illegal scheme, "whether they realized it or not." *Id.* at 402. At no time did the district or circuit court review the privileged communications, *in camera* or otherwise, before revoking the attorney-client privilege.[10] *See*

9 The *in camera* submission in that case was *not* the disputed communications, but rather independent evidence in the government's possession related to destruction of evidence. *Id.* at 398, 400.

10 The court did "require[ ]" that the district court make a "question-by-question determination" of the application of the crime-fraud exception to the grand jury testimony of the attorneys in order to protect the communications from unnecessary disclosure. *Id.* at 403.

also In re Sealed Case, 737 F.2d 94, 101 n.10 (D.C. Cir. 1984) (affirming finding that privileged communications did not fall within the crime-fraud exception, and "reject[ing] the government's contention that the district court should have questioned [counsel] on this conversation *in camera, ex parte*"); *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59-61 (7th Cir. 1980) (examining grand jury material submitted by the government *in camera* to determine ongoing fraud, but not the communications themselves);[11] *Sound Video Unlimited, Inc.* v. *Video Shack, Inc.*, 661 F. Supp. 1482, 1486-89 (N.D. Ill. 1987) (relying on independent evidence to establish in part and to reject in part both prongs of the crime-fraud exception); *cf. In Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1041 (2d Cir. 1984) (although documents submitted *in camera*, crime-fraud exception established "[w]ithout having resort to the documents themselves").

Other courts have followed the practice of allowing *in camera* review to protect against overbroad disclosure after finding, by independent evidence, both prongs of the crime-fraud exception. *See, e.g., In Re Grand Jury Proceedings*, 723 F.2d 1461, 1467 (10th Cir. 1983); *In Re John Doe Corp.*, 675 F.2d 482, 486-87, 491 (2d Cir. 1982); *Pfizer, Inc.* v. *Lord*, 456 F.2d 545, 549-51 (8th Cir. 1972).

In *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277 (8th Cir. 1984), *cert. dism'd*, 472 U.S. 1022 (1985), the district court had reviewed the disputed document *in camera* and ordered it produced under the crime-fraud exception. *Id.* at 280. On appeal, however, the Eighth Circuit, relying solely on extrinsic evidence, found that the disputed document was not in

11 In several cases, courts have examined *in camera* grand jury or other confidential materials submitted by the *government*. These *in camera* submissions to protect the secrecy of the government's investigation must not be confused with the *in camera* submission of the disputed privileged communications. *See, e.g., In re Sealed Case*, 676 F.2d 793, 815 n.90 (D.C. Cir. 1982) (opinion of Wright, J.) (apparently confusing *in camera* submission of government evidence in *Special September 1978 Grand Jury*, 640 F.2d at 56-57, with issue of submission of the disputed communications).

furtherance of a crime or fraud. *Ia.* at 282-83.[12] Moreover, the court questioned the sufficiency of the *prima facie* showing of fraud, which had been made exclusively on independent evidence. *Id.* at 283 n.6.

2. Other Courts Have Relied upon Independent Evidence to Show at Least an Ongoing Crime or Fraud

In *Clark* v. *United States*, *supra*, this Court analogized the privilege of jury deliberations to the attorney-client privilege in the context of a crime-fraud issue. 289 U.S. at 15. The Court held:

> There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them.

Id. at 14 (footnote omitted). This Court then considered evidence independent of the events in the jury room to establish a *prima facie* case of crime or fraud. Only after finding that "the evidence of guilt is ample, without the happenings in the jury room," *id.* at 18, did the Court "let in the light" on the otherwise privileged jury deliberations, *id.*

In *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986), the court also relied upon independent evidence consisting of grand jury testimony and facts of a related case to establish a *prima facie* case of illegality. *Id.* at 164, 166. The court then authorized the examination of the communications *in camera* to determine which, if any, specific communications fell within the crime-fraud exception. *Id.* at 168. This *in camera* review was ordered in response to the district court's ruling that all the disputed documents be produced *en masse*, and it was specifically intended to protect against the release of privileged communications that did not fall within the crime-fraud exception.[13] *Id.* at 168.[14]

12 Although that court believed the disputed document might help to prove a fraud, it was held privileged because it was not prepared in furtherance of the fraud. 751 F.2d at 283.

Several courts have also permitted or refused discovery of otherwise privileged attorney fee and client identity information based upon whether the government had established by independent evidence a *prima facie* case of an ongoing criminal conspiracy as to which obtaining legal services was a part of the conspiracy. *See, e.g., In Re Grand Jury Proceedings*, 680 F.2d 1026, 1028 (5th Cir. 1982); *In Re Grand Jury Proceeding in*

13 The government is mistaken in stating that the district court "refus[ed] to apply the crime-fraud exception." Gov't Br. at 45. The Court of Appeals ordered *in camera* review because the district court ordered *production* of the communications "*en masse*" without determining whether they were in furtherance of the violation shown by independent evidence. 805 F.2d at 168. In context, the clear import of the court's statement that the district court should have reviewed the documents *in camera* was to limit disclosure in light of the fact that the government's independent evidence of the illegality "is grand jury testimony not subject to disclosure," and hence, not subject to challenge by the privilege's proponent.

14 *See also United States* v. *Dyer*, 722 F.2d 174, 176, 178 (5th Cir. 1983) (*prima facie* case shown by letter and taped conversations between defendant and informant); *In re Murphy*, 560 F.2d 326, 338-39 (8th Cir. 1977) (*in camera* review of documents to determine "if they bore a close relationship to [the] fraud" established by independent evidence); *United States* v. *Bob*, 106 F.2d 37, 40 (2d Cir.) (crime shown by independent evidence prior to admission of attorney's testimony), *cert. denied*, 308 U.S. 589 (1939); *In Re National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 116 F.R.D. 297, 300-02 (C.D.Cal. 1987) (*in camera* review of *particular* communications to determine whether they are within the scope of the exception made by independent evidence); *Shirvani* v. *Capital Investing Corp., Inc.*, 112 F.R.D. 389, 391 (D. Conn. 1986) ("wiser course may usually be to require some such showing [of *prima facie* crime or fraud] which is independent of the very communications sought"); *Coleman* v. *American Broadcasting Cos., Inc.*, 106 F.R.D. 201, 203, 209 (D.D.C. 1985) (opponents of the privilege "failed to make an adequate factual showing to even require an *in camera* examination of documents or other materials for which the privilege has been claimed," noting absence of "*independent evidence* from depositions of witnesses or from document production that the attorney affirmatively participated in" illegal activities) (emphasis added); *cf. In Re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235, 1242-43 & n.11 (5th Cir. 1982) (apparently requiring that *prima facie* showing of ongoing fraud be made by independent evidence).

Matter of Fine, 641 F.2d 199 (5th Cir. 1981); *In Re Grand Jury Proceedings*, 600 F.2d 215 (9th Cir. 1979); *Hodge & Zweig*, *supra*, 548 F.2d at 1354-55.

Not only have most courts applied in practice some version of the independent evidence rule, but commentators have recognized it as well.[15] The government is simply wrong when it states that the secondary sources "confirm" that the independent evidence rule is a "maverick" one (Gov't Br. at 46).

3. Cases Cited by the Government Do Not Support the View that Courts Have Uniformly Rejected an Independent Evidence Rule

The government cites to six cases that discuss the crime-fraud exception, ignoring the many cases, discussed *supra*, that applied in practice an independent evidence rule. As shown, *supra*, *Antitrust Grand Jury*, 805 F.2d 155, in fact relied upon independent evidence to show an antitrust violation. Similarly, *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), relied upon extensive independent evidence to uphold a *prima facie* showing of crime or fraud. *Id.* at 798-802; *id.* at 813 (opinion of Wright, J.). Judge Wright merely suggested, without any discussion,

15 *See, e.g.*, S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 359 (4th ed. 1986) ("The common law rule is . . . [that] the Trial Judge must *first* determine that the government has made a *prima facie* case that the privilege does not apply because the communication was in furtherance of a crime or fraud. *Only then* should the Trial Judge look at the documents.") (emphasis added); 3 Jones, *On Evidence* § 21:18 at 795-96 (6th ed. 1972) ("There should be some independent proof of wrongful purpose; the mere suggestion of fraud does not afford sufficient ground for setting aside the general rule."). Given that proposed Fed. R. Evid. 503(d)(1) was rejected, the commentary upon which the government relies, Gov't Br. at 46, should be given little weight, at best. In any event, the commentary goes only to the second prong of the analysis, and not to the showing of the crime or fraud. Moreover, Rule 501 requires that the privilege should be governed by the common law. At the time of Rule 501's adoption in 1975, the leading cases such as *Clark*, *supra*, *Bob*, *supra*, and *Shewfelt*, had recognized that the *prima facie* showing of crime or fraud must be made by independent evidence before "let[ting] in the light." *Clark*, 289 U.S. at 18.

"In appropriate cases the subpoenaed material itself may provide *prima facie* evidence of a violation." *Id.*[16]

Three of the cases contain no discussion of how the crime-fraud exception must be shown, nor do they indicate whether the parties ever challenged the propriety of submitting the documents *in camera*, nor whether they had been submitted as part of the proponent's attempt to establish the privilege. *See, e.g.*, *In re Grand Jury Proceedings*, 604 F.2d 798, 799-800, 803 (3d Cir. 1979); *Union Camp Corp.* v. *Lewis*, 385 F.2d 143 (4th Cir. 1967); *Irving Trust Co.* v. *Gomez*, 100 F.R.D. 273, 275 (S.D.N.Y. 1983) (disputed documents "were presented to the Court on the consent of the parties for *in camera* inspection").

The only appellate court that has considered and explicitly rejected an independent evidence rule is *In Re Berkley & Co., Inc.*, 629 F.2d 548 (8th Cir. 1980).[17] The issue was argued by the proponent only "[i]n a brief footnote," and the court's response was likewise limited to a brief footnote. *Id.* at 553 n.9. The court then relied upon extensive independent evidence as well as nineteen disputed documents to determine both the existence of a crime or fraud and that the attorney-client communications were in furtherance of that scheme. *Id.* at 550, 552-53.[18] Moreover, the Eighth Circuit in *Pritchard-Keang Nam Corp.*, *supra*, implicitly modified or overruled *Berkley*'s rejec-

16 *See In re Sealed Case*, 754 F.2d 395, 403 (D.C.Cir. 1985) (Mikva, J., concurring) (discussion of the crime-fraud exception in *In re Sealed Case*, 676 F.2d at 812-16, expressed only the views of Judge Wright); *see also* note 11, *supra*.

17 *United States* v. *King*, 536 F. Supp., 253 (C.D. Cal. 1982), refused to follow *Shewfelt*'s limited independent evidence rule, but, ironically, found "there is evidence independent of the April 7 conversation to establish a prima facie case of criminal activity." *Id.* at 262.

18 Indeed, the district court review of the documents in *Berkley* focused primarily on whether the proponent had established the elements of the privilege. Only 19 of some 264 documents were found privileged prior to consideration of the crime-fraud exception. *Id.* at 552. While the opinion is less than clear, *Berkley* appears to be a case in which the *proponent* of the privilege could not substantiate his claim of privilege without *in camera* review of the communications, and cannot then complain that the court also reviewed the documents for evidence of the crime-fraud exception.

tion of an independent evidence rule. It is *Berkley* that is truly the "maverick" decision on this issue.

D. Respondents Prevail Under Either Version Of The Independent Evidence Rule

Under either version of the independent evidence rule, the panel opinion below must be affirmed.[19] Obviously, if the Court agrees that both prongs of the *prima facie* case must be satisfied by independent evidence, then there is no question that the government failed to meet this burden. Even as to the first prong—an ongoing crime or fraud—the Court of Appeals panel found that the government failed to establish a *prima facie* case by independent evidence. Indeed, the panel analyzed only the first prong of the crime-fraud exception, holding that the showing of illegality must be by independent evidence. "In *Shewfelt*, we said that 'before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie *case of fraud independently* of said communications.' " *Zolin*, 809 F.2d at 1418 (Pet. App. 21a) (quoting *Shewfelt*, 455 F.2d at 840) (emphasis added and original).

The panel then reviewed "[t]he Government's independent evidence *of intended illegality*." *Id.* (Pet. App. 23a) (emphasis added). This independent evidence of alleged crime or fraud consisted of general allegations that members of the Church planned to violate tax laws or possibly engage in fraud. *Id.* at 1418-19 (Pet. App. 23a-24a). The court, upon review of this evidence, correctly found it "not sufficient to make out the requisite prima facie showing of intended illegality." *Id.* at 1419

19 The order to rehear the case *en banc* was vacated as improvidently granted and, with the deletion of the question whether *Shewfelt* should be reviewed *en banc*, "[t]he opinion of the three-judge panel will stand in all other respects." *Zolin*, 842 F.2d at 1136 (Pet. App. 2a). Thus, the panel opinion is the extant opinion on the application of the independent evidence rule to the facts for purposes of this Court's review. *See also Zolin*, 850 F.2d 610 (Resp. App. 2a) (Norris, J., concurring).

(Pet. App. 24a).[20] Given the paucity of independent evidence of illegality, this decision was not an abuse of discretion, *see Grand Jury Investigation*, 842 F.2d at 1226, and therefore, under either version of the independent evidence rule, the judgment below should be affirmed.[21]

E. *Bourjaily* is Irrelevant to the Privilege Issue Here

The government's reliance upon *Bourjaily* v. *United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987), which concerned the admissibility at trial of a co-conspirator's hearsay statement under Fed. R. Evid. 801(d)(2)(E), is simply irrelevant to the privilege issue here. The Court merely held that the hearsay statements could be considered to determine if there was a conspiracy. 107 S.Ct. at 2781. In rejecting exclusive reliance upon independent evidence, the Court rested upon Fed. R. Evid. 104(a), which states:

> Preliminary questions concerning . . . the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence *except those with respect to privileges.*

(emphasis added); *see also* Fed. R. Evid. 1101(c) ("the rule with respect to privileges applies at all stages of all actions, cases, and proceedings"); Rule 1101(d). Thus, unlike in *Bourjaily*, the court may not "consider[ ] any evidence it wishes, unhindered by considerations of admissibility." 107 S.Ct. at 2780. Indeed,

20 The government's independent evidence of the alleged illegality focused on the attorney-client communications themselves. The point of the panel decision below, however, is that the independent evidence proffered by the government failed to make out even a *prima facie* showing of an intended crime or fraud, *i.e.*, the first part of the test.

21 Indeed, the *en banc* dissent reviewed the communications themselves and agreed that the district court did not abuse its discretion in finding no *prima facie* case of intended illegality. *Zolin*, 842 F.2d at 1139 (Pet. App. 9a).

the court explicitly stated that in considering admissibility, a court is "bound . . . by the rules of privilege." *Id.*[22]

Moreover, *Bourjaily* dealt with the admissibility of evidence at trial. The issue here is not whether certain evidence is admissible, but the wholly separate question whether the otherwise privileged attorney-client relationship should be reviewed by a court in the absence of independent evidence of wrongdoing. The harm to the attorney-client privilege results from its revelation to anyone outside the confidential communication, not merely a determination that the evidence is admissible at trial. No such issue arises with mere hearsay evidence, which is commonly reviewed in various pre-trial proceedings. The government's attempt, in the face of Rule 104(a), to extend *Bourjaily* into the privilege realm must be rejected.

II.

THE DISTRICT COURT ACTED WELL WITHIN ITS AUTHORITY IN ISSUING A PROTECTIVE ORDER PROHIBITING THE IRS FROM MAKING DISCLOSURES OF THE SUMMONED INFORMATION WHICH WOULD HAVE VIOLATED § 6103 AND WHICH WOULD NOT HAVE BEEN IN FURTHERANCE OF ITS TAX INVESTIGATION

The government urges the extreme view that courts have no authority to issue protective orders preventing the IRS from illegally disclosing summoned information, even in cases, as here, where the prohibited disclosures are wholly unrelated to furthering the IRS's investigation of the taxpayer. To place the extraordinary breadth of this position in perspective, it is necessary to review briefly the proceedings in the district court.

The Church challenged the IRS's good faith in issuing the summons on the ground that the IRS was acting as an information-gathering agency for the Department of Justice

22 The Court specifically declined to decide whether the conspiracy showing could be made *exclusively* by hearsay statements, unsupported by corroborative independent evidence. 107 S.Ct. at 2781-82.

and was not conducting a good faith tax investigation. At the time the IRS issued the summons, the Church was involved in several lawsuits against the government, including two civil rights actions, the *Founding Church* case in Washington D.C. and the *Linberg* case in Los Angeles. In opposing enforcement of the summons, it introduced evidence that the IRS agents responsible for issuing the summons in this case had been closely collaborating with Department of Justice attorneys representing the government in the *Founding Church* and *Linberg* actions. The Justice Department attorneys were looking to the IRS for discovery helpful in defending the civil actions. The evidence showed, among other things, that the IRS agents had already violated 26 U.S.C. § 6103(a) by disclosing to the Justice Department attorneys the fact that the IRS was investigating Mr. Hubbard. It also persuasively suggested that the IRS agents and the government attorneys in the *Founding Church* case were cooperating in efforts to obtain the documents which are the subject of this summons enforcement proceeding. There is no question, moreover, but that IRS's disclosure of the summoned records to the Justice Department attorneys would have violated § 6103(a). There is no exception among the numerous exceptions set forth in subsections 6103(c) to (o) for disclosures to government attorneys for use in non-tax civil litigation.

Following a brief evidentiary hearing, the district court found that the IRS was pursuing a criminal investigation in good faith and accordingly enforced the summons. At the same time, however, it took cognizance of the Church's evidence by issuing a protective order designed to ensure that the IRS would not violate § 6103(a) by disclosing the summoned information to the Justice Department attorneys. As the district court explained:

> I should make it clear that this order is in a sui generis case. The I.R.S. and the United States [sic] [the Church are] in general carrying on litigation with each other in innumerable places and courts. And it looks like it isn't going to abate from what I have seen. . . .
>
> If you didn't have these various levels of litigation between the Government on the one hand and the Church

> on the other, then where there is fear that information acquired for one purpose may be in effect used for civil discovery in the other, I wouldn't think it necessary to make such an order. But this case is, therefore, not the typical case where you would routinely expect this kind of provision.

(J.A. 67). At the same time, the court made abundantly clear that it would permit disclosure of any information which may properly be disclosed under § 6103 (J.A. 60, 66, 68).

In this Court the government has urged the broad principle that in enforcing a summons the court may never place any restrictions whatsoever on the disclosure of the summoned information. In the government's view, a district court has only two choices in a summons enforcement proceeding: It may either enforce the summons in *toto* or deny enforcement altogether. It may not, according to the government, enforce the summons and at the same time issue a protective order limiting improper disclosure of the very material summoned in any respect, even to prohibit illegal disclosures unrelated to the IRS's tax investigation.[23] This rigid all or nothing approach is inconsistent with the inherent power of the courts to prevent their process from being abused. It also unduly restricts the ability of the district courts to accommodate both the interests of the IRS in obtaining information relevant to an ongoing investigation, on the one hand, and the interests of a taxpayer in preventing the summoned information from being improperly disclosed.

A. The District Court Has Inherent Power To Prevent Information Obtained Through Invocation Of Its Process From Being Disclosed Improperly

The federal courts have long exercised the authority to issue protective orders in appropriate cases to prevent confidential

23 This is in contrast to the order sought by the taxpayer in *United States* v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988) (*en banc*), *petition for cert. pending*, No. 87-1705, which would have prohibited the IRS from disclosing, as part of its investigation, information other than that obtained in the summons.

information obtained through invocation of their process from being improperly disclosed. This authority, which the government challenges here, rests upon the inherent power of the courts to ensure that their process is not abused and derives from the very nature of Article III courts. It is thus an essential aspect of the independence of the judiciary under the separation of powers.

As with all administrative agencies, the IRS is without authority to compel through its own process the production of witnesses and papers. *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894), established that the decision to enforce an administrative subpoena is judicial in nature, and since then Congress has acquiesced in the Court's judgment. *See, e.g.*, *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123-24 (3rd Cir. 1981) (*en banc*); *United States* v. *Friedman*, 532 F.2d 928, 936-37 (3rd Cir. 1976). Thus, in order to obtain enforcement of a summons, the IRS must, as it did here, institute an action in a district court under 26 U.S.C. § 7604(a) or 7402(b). *See, e.g.*, *Reisman* v. *Caplin*, 375 U.S. 440, 445-46 (1964).

Once having invoked the powers of a district court, however, the IRS, like all other litigants, is subject to the court's inherent power to prevent abuses of its process. "[T]he equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise." *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-46 (1888). Section 7604(a) in no way attempts to circumscribe this power; indeed, it expressly provides that the district courts "have jurisdiction *by appropriate process* to compel . . . attendance, testimony, or production of books, papers, records, or other data" (emphasis added).[24] This Court's decisions, likewise, repeatedly affirm that the courts remain fully possessed of their inherent power to prevent abuses of their process in IRS summons enforcement proceedings.

In its seminal decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), this Court established the standards applicable in

24 The wording of § 7402(b) is virtually identical.

IRS summons enforcement proceedings and, in so doing, expressly instructed the courts to be vigilant in their prevention of agency abuses of their process: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Id.* An abuse of process would occur, the Court held, where the summons was issued for an improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.* Subsequently, in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court elaborated that once the IRS recommends to the Department of Justice that a criminal prosecution be undertaken or abandons in an institutional sense any investigation of a taxpayer's civil tax liability, enforcement of an IRS summons would constitute an abuse of the court's process. *Id.* at 317-18. Additionally, it held that the courts may not permit the IRS to act as an information-gathering agency for other departments of the government. *Id.* at 317. At the same time, moreover, it expressly disclaimed any notion that the examples of conduct constituting an abuse of process set forth in *Powell*, as amended in *LaSalle*, were intended to be exclusive. *Id.* at 317-18 n.19 and n.20. "Future cases may will reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 318 n.20.

In accordance with *Powell* and *LaSalle*, the lower federal courts have prohibited a variety of other abuses of their process in IRS summons enforcement cases. *See, e.g., United States* v. *Beacon Federal Savings & Loan*, 718 F.2d 49, 53-54 (2d Cir. 1983) (to avoid abuse of court's process, summons resulting from information obtained from Fourth Amendment violations should not be enforced in certain circumstances); *United States* v. *Friedman*, 532 F.2d at 937-38 (to prevent abuse of court's process, court may where appropriate condition enforcement of summons on government reimbursement of reasonable costs of producing summoned materials). In *Friedman*, the Court held that § 7604(a) in no way purports to limit the power of the court to exercise its inherent authority to choose an appropriate rule

of decision in an enforcement proceeding: "We conclude from the very fact that enforcement of a § 7602 summons is by § 7604(b) [sic] entrusted to the judiciary, this court has the power to fashion appropriate rules as to the fairness of the enforcement order." *Id.* at 937.[25]

Furthermore, as the district court did below, the courts have traditionally exercised their inherent power to restrict improper uses of information obtained through invocation of their process. Civil discovery provides perhaps the most obvious example. The federal and state courts routinely issue protective orders to ensure the confidentiality of discovered information.[26] Only a few terms ago, this Court rejected a First Amendment challenge to the issuance of a protective order prohibiting the use of information obtained in discovery for any purpose other than to prepare for and try the case. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34-37 (1984). The Seattle Times had obtained information about the financial affairs of the plaintiff, a religious group, through an order compelling discovery and had intended to publish and disseminate the information as news. Relying on *Gumbel* v. *Pitkin*, *supra*, and the inherent power of courts to prevent abuses of their process, the Court held that the invasion of privacy which results from the publication of confidential information produced pursuant to court order is an abuse of the court's process and, on this basis, upheld the protective order. *Id.* at 35-36, *citing*, *International Products Corp.* v. *Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (Friendly,

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25 Drawing from *Powell* and *LaSalle*, the lower courts have also prohibited abuses of their process in a wide variety of circumstances in subpoena enforcement actions instituted by other government agencies. *See, e.g., SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126-30 (3d Cir. 1981) (*en banc*); *SEC* v. *ESM Government Securities, Inc.*, 645 F.2d 310, 314-18 (5th Cir. 1981).

26 *See, e.g., The Courier Journal* v. *Marshall*, 828 F.2d 361, 364-67 (6th Cir. 1987); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355-56 (11th Cir. 1987); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1118-23 (3rd Cir. 1986), *cert. denied*, 108 S.Ct. 487 (1987); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

J.).[27] *See also Laxalt* v. *McClatchy*, 809 F.2d 885, 889-90 (D.C. Cir. 1987) (courts traditionally issue protective orders to prevent confidential information subpoenaed under Fed.R.Civ.P. 45 from being disclosed, especially where, as here, a statute protects the confidentiality of the information); *Friedman* v. *Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1343-44 (D.C. Cir. 1984) (same).

Even closer in point, this Court has previously made clear that the courts stand as a barrier to the improper disclosure of confidential information subpoenaed by administrative agencies. In *FCC* v. *Schreiber*, 381 U.S. 279, 295-98 (1965), the Court held that if the Commission decides to disclose subpoenaed information which the producer believes should be accorded confidentiality, judicial protection is available prior to the disclosure. *Id.* at 296, *citing Reisman* v. *Caplin*, 375 U.S. 440 (1964). Because the Commission in that case had not yet denied confidentiality to the bulk of the subpoenaed records, the Court concluded issuance of a protective order was premature and would usurp the agency's discretion to decide whether to accord the records confidential treatment in the first instance. It, nonetheless, left no doubt that judicial protection would be available to protect "against improvident disclosure[s]" by the Commission. 381 U.S. at 297-98. Indeed, as to a small portion of the subpoenaed materials which the agency had already declined to accord confidentiality, the Court reviewed the Commission's decision but found that it was proper on the merits. *Id.* at 298-99.

Likewise, the lower courts have long recognized their discretion to issue protective orders when enforcing administrative

27 Protective orders are authorized by Rule 26(c) of the Federal Rules of Civil Procedure for good cause shown. This Court has repeatedly held that the Federal Rules are applicable to IRS summons enforcement proceedings. *See Upjohn Co.* v. *United States*, 449 U.S. 383, 398-99 (1981); *Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971); *Powell*, 379 U.S. at 58 n.18. Fed.R.Civ.P. 81(a)(3) expressly provides that "[t]hese rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

subpoenas. In *FTC* v. *Lonning*, 539 F.2d 202, 210-11 (D.C. Cir. 1976), for instance, the court reaffirmed the authority of the district courts to ensure the confidentiality of trade secrets by requiring "appropriate protection as a precondition to enforcement of FTC subpoenas." *Id.* at 211, and cases cited therein. Noting the similarity of protective orders in this context to those issued to protect confidential information in discovery under the Federal Rules of Civil Procedure, *id.* at 211 n.17, the court further held that the "decision as to the type and scope of any protective order rests within the sound discretion of the trial judge and must be determined on a case by case basis." *Id.* at 211. The court concluded, however, that a protective order was unnecessary in that case because the Commission had already sufficiently insured the confidentiality of the information.[28]

These authorities amply demonstrate that the district court's long recognized inherent power fully authorized it to restrict the IRS from disclosing summoned information in violation of § 6103 to Justice Department lawyers involved in non-tax civil litigation with the Church, as the Church had demonstrated there was a substantial possibility it would it do. Indeed, as the court of appeals recognized, this case presented a peculiarly appropriate occasion for exercise of the court's authority. With evidence before it that the IRS intended to willfully violate a congressional enactment mandating that tax information be held confidential except in delineated circumstances not applicable here, the court was faced with a serious threatened

28 *See also Dow Chemical* v. *Allen*, 672 F.2d 1262, 1277-78 (7th Cir. 1982) (affirming the quashing of an FTC subpoena where district court had concluded that protective order "might not be fully effective"); *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 883-85 (D.C. Cir.) (*en banc*) (imposing notice requirement on FTC before disclosing information producer designates as confidential so that there will "opportunity for judicial review . . . if producers believe that a particular proposed disclosure is improper"), *cert. denied*, 431 U.S. 974 (1977). The courts have reached the same result with regard to subpoenas issued by other administrative agencies. *See, e.g.*, *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1389 (D.C. Cir.) (*en banc*) (judicial review available to prevent release by SEC of confidential information), *cert. denied*, 449 U.S. 993 (1980).

abuse of its process by executive branch officials which could only be prevented by issuance of a protective order. Under circumstances such as these, judicial independence and our system of separation of powers requires that the government's narrow view of the court's authority be rejected.

B. This Court's Decisions In IRS Summons Cases Provide No Support For The Broad Limitations On The Inherent Power Of The Courts Urged By The Government

1. Section 6103 Is an Unambiguous Limitation on the IRS's Summons Power and, in any Event, the Restrictions Imposed by the District Court's Order Cannot by Definition Interfere with the Effective Performance of the IRS's Enforcement Responsibilities

In support of its position that the role of the courts is strictly limited to enforcing or denying enforcement of an IRS summons, the government relies heavily on statements of this Court that restrictions on the IRS's summons authority should be avoided in the absence of an unambiguous congressional direction. *See, e.g., United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984); *United States* v. *Euge*, 444 U.S. 707, 711 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975). Section 6103, however, is precisely such a congressional direction. It reflects a broad congressional judgment that information obtained by the IRS is confidential and should not be disclosed except in narrowly delineated circumstances provided for by statute. S.Rep. No. 94-938, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3455. It is thus a general limitation on the IRS which perforce applies to all of its activities, including its use of materials obtained through the summons power.[29]

29 Nor is it relevant, as the government contends, whether Congress intended to authorize an action for injunctive relief to restrain violations of § 6103. As is explained further, *infra* at 44, the district court's order was simply not an injunction. Rather, it was a protective order issued to prevent the IRS from abusing the court's process after it—not the taxpayer—sought the court's assistance, and there is absolutely no indication that Congress sought in § 6103 to limit the courts in the exercise of their inherent power. Likewise, since the order was not an injunction, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), has no application here.

The presumption against imposing restrictions on the IRS's summons power is inapposite for another reason. As the Court's decisions readily reveal, the underlying concern of the presumption is that the IRS have those powers necessary to the effective enforcement of the tax laws. Indeed, the Court itself has expressly so explained on numerous occasions:

> "[T]his Court has consistently construed congressional intent to require that *if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code*, that authority should be upheld absent express statutory prohibition or substantial countervailing policies."

Arthur Young, 465 U.S. at 816, *quoting*, *Euge*, 444 U.S. at 711. (emphasis added).[30]

In this case, the reason for the district court's restriction on the IRS's disclosure of the summoned information is wholly unrelated to any tax investigation and, consequently, in no way impedes the IRS in "the effective performance of congressionally imposed responsibilities to enforce the tax Code." *Id.* In the district court, the Church submitted evidence to show that the IRS, in violation of § 6103, intended to disclose the summoned records to Department of Justice attorneys representing the government in civil lawsuits brought by the Church so that they might use the information in defending those actions. The

30 For this reason, these and the other decisions of this Court on which the government relies are unremarkable and irrelevant here. They are expressly based on the need to ensure that the IRS has the authority necessary to effectively enforce the tax laws. *See, e.g., Arthur Young*, 465 U.S. at 818-21 (declining to recognize in IRS sumons proceedings a work-product immunity for tax accrual papers prepared by a taxpayer's accountant); *Euge*, 444 U.S. 716-18 (ruling that the summons power extends to compelling handwriting exemplars); *Bisceglia*, 420 U.S. at 150 (recognizing even in the absence of express statutory authority the IRS's right to issue "John Doe" summonses); *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 322-23 (1985) (permitting the IRS to avoid complying with the procedural requirements of the later enacted John Doe summons provisions, 26 U.S.C. § 7609(f), where the summoned records are relevant to an investigation of the tax liability of the summoned taxpayer even though they are also relevant to the lax liability of unnamed third parties).

purpose of the district court's order was thus to prohibit these imminent violations of § 6103 and could in no way interfere with the IRS's tax investigation. Whether the IRS disclosed the information to the Justice Department attorneys or not was entirely irrelevant to its investigatory interests, although in contrast, it was critical to the court's concern that its process not be abused.[31]

Indeed, in most instances IRS disclosures are apt to be unrelated to any tax investigation. A review of § 6103's exceptions to the non-disclosure rule reveals the wide variety of circumstances entirely unrelated to any tax investigation in which the

31 The district court specifically indicated, in fact, that its order would not affect "I.R.S. gathering other information" (J.A. 69), and that its purpose was to permit the IRS to use the summoned information "for the purpose of their tax investigation." *Id.* By its terms, the court's order applies only to disclosures to "any other government agency," (Pet. App. 29a), not to third parties. In the district court, the government had to strain to hypothesize any circumstance remotely related to the facts of this case in which this restriction could conceivably affect its investigation (J.A. 68-69).

To the extent the order additionally requires prior court approval for any disclosures, the district court's reasoning was clear. Without predisclosure review, it could not ensure that the IRS would in good faith comply with § 6103, a subject on which it had ample basis for harboring doubts. *Cf. In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356-57 (11th Cir. 1987) (approving use of "umbrella" protective orders under which any document designated confidential by producing party is deemed protected unless challenged and court orders otherwise); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d at 1121-22 (same). In addition to the evidence presented by the Church, the government asserted in open court its mistaken view that § 6103 does permit disclosure to aid the government in non-tax litigation; whereas, on the contrary, § 6103 strictly prohibits disclosure to aid non-tax *civil* litigation and only permits disclosures to aid criminal non-tax litigation in the circumstances specified in §§ 6103(i)(1) and (2). (*See* J.A. 50, where the government asserted incorrectly that where the "Federal Government is involved in litigation that is not involved in a tax matter, it can seek through a court order the IRS text [sic] or taxpayer return information.")

In any case, should this Court find the district court's order overbroad in any respect, a simple modification of the order, by this Court or on remand, would be sufficient to cure any technical defect. The protective order need only prohibit the IRS from disclosing the summoned information to Department of Justice attorneys representing the government in non-tax civil litigation with the Church.

IRS may disclose tax information.[32] This is not to suggest that the IRS never discloses tax information in furtherance of its tax investigations[33] or that a protective order prohibiting the IRS from making such disclosures might never impede its investigation. On the contrary, the point is that the government's emphatic argument that *any* power in the courts to prohibit disclosures, even disclosures unrelated to a tax investigation, would somehow interfere with the IRS's investigatory interests is misplaced. The government's broad brush approach simply cannot withstand scrutiny.

The government's concern is better suited to facts such as those presented in *United States* v. *Barrett*, *supra*, 837 F.2d 1341. In that case, the IRS, prior to issuing the summons at issue, had disclosed the fact that Dr. Barrett was under investigation for criminal tax fraud to some of his patients in order to obtain information about their financial transactions with him. Indicating that these disclosures were necessary to its investigation, the IRS stated that it would continue to disclose this information to patients whose names were revealed in the summoned records. In turn, Dr. Barrett argued that these disclosures were not authorized under § 6103(k)(6) and sought a protective order preventing the IRS from disclosing the information to his patients.

32 *See, e.g.*, § 6103(f) (disclosure to persons with material interest); § 6103(g) (disclosure to President or his designees under specified circumstances); 6103(i)(3)(B)(i) (disclosure to prevent death or physical injury); § 6103(i)(3)(B)(ii) (disclosure to warn of imminent flight from federal prosecution); § 6103(i)(5) (disclosure to locate fugitive); § 6103(l) (disclosure for a wide variety of non-tax related purposes to various federal, state and local government agencies).

33 *See, e.g.*, § 6103(k)(6) (permitting disclosure by an IRS official or employee "to the extent that such disclosure is *necessary* in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax [liability]") (emphasis added). The legislative history of this exception indicates that it was intended to permit the IRS "in rare and extraordinary cases" to disclose return information to a "third party where it is necessary in order to obtain information not otherwise reasonably available." S.Rep. No. 94-938 at 342, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3771.

Had the court issued such a protective order, it would clearly have been interfering in the IRS's investigation, albeit only to prevent illegal disclosures, thus raising the question briefed by the government here. The government's bootstrapping of the *Barrett* issue into this case, however, cannot justify the broad restriction on the district court's inherent power which the government urges. As framed by the government, the question presented to this Court is whether "in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information." Thus, irrespective of whether a court may restrict IRS disclosures in a manner which would impinge on the IRS's conduct of its investigation by illegal means, the question here is whether any restriction, including one completely unrelated to its investigation, is ever permissible.[34]

Similarly, the government's concern that the availability of protective orders may cause delays and unduly burden summons enforcement proceedings is equally uncompelling. As a practical matter, additional delay is unlikely to occur. In opposing enforcement of a summons, a taxpayer ordinarily can be expected to submit all available evidence to demonstrate that the IRS's investigation is in bad faith, including evidence of prior and/or intended unlawful disclosures of return information. Thus, the evidence submitted in support of both remedies will usually be the same. *See Barrett*, 837 F.2d at 1356-57 (Brown, J., concurring in part and dissenting in part). Indeed, this case is instructive. The Church put forward its evidence of

34 Thus, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), under any view, is inapplicable here, notwithstanding the issues discussed *infra* of whether it applies to protective orders at all. As construed in the cases cited in the government's brief, the Act prohibits the issuance of an injunction restraining the IRS from making any use of information which it colorably claims is in furtherance of a tax investigation. It is arguable, therefore, that the Act prevents issuance of an injunction in cases where the IRS claims that its intended disclosures are in furtherance of its tax investigation. Such an injunction might impede its investigation and thereby indirectly its "assessment or collection" of taxes. § 7421(a). It clearly has no application, however, to cases where, as here, the protective order, even if considered an injunction, is directed at disclosures wholly unrelated to any IRS tax investigation and thus cannot restrain the assessment or collection of any tax.

bad faith at a brief evidentiary hearing held expeditiously after the filing of the petition. The same evidence submitted to establish bad faith also went to the need for a protective order, and thereafter the court issued its protective order at the same time that it enforced the summons. The Church instituted no other proceedings and caused no further delay.

Furthermore, the lower courts have adopted strict procedures designed to ferret out unmeritorious taxpayer claims expeditiously, taking to heart this Court's admonition in *LaSalle* that the taxpayer's "burden is a heavy one." 437 U.S. at 316. While there are some minor variations in practice among the circuits, the following generalizations may be made: The courts impose only a light burden on the IRS to establish a *prima facie* case under *Powell* through the submission of affidavits. In contrast, the taxpayer is ordinarily entitled, at most, to highly restricted discovery and, in many cases, to no discovery at all. He nevertheless must refute the IRS's *prima facie* case with specific factual allegations to be entitled even to a limited evidentiary hearing. The hearing is ordinarily brief, allowing the taxpayer to cross-examine only the agent who issued the summons. Only if at the hearing the taxpayer creates a substantial doubt as to the good faith of the investigation is he entitled to somewhat fuller discovery. Moreover, courts have set strict time limits for the petition, answer, discovery, and any evidentiary hearings. *Compare United States* v. *Kis*, 658 F.2d 526, 536-42 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), and *United States* v. *Garden State National Bank*, 607 F.2d 61, 70-71 (3rd Cir. 1979) *with United States* v. *Harris*, 628 F.2d 875, 879-83 (5th Cir. 1980).

In light of these strict procedures, it is difficult to see how a taxpayer can significantly delay enforcement by making an unmeritorious request for a protective order. The district courts, armed with summary procedures, can handle this problem in the proper exercise of their discretion. To the extent, moreover, that a taxpayer raises substantial questions about the IRS's intentions, the court must act to prevent its process from

being abused. *Powell*, 379 U.S. at 58. Some additional delays, where necessary, are warranted in such cases.[35]

2. *LaSalle* and *Tiffany Fine Arts* Implicitly Approve the Issuance of Protective Orders to Prevent Improper Disclosures of Summoned Information

The government further argues that the decisions of this Court in *LaSalle*, 437 U.S. 298, and *Tiffany Fine Arts*, 469 U.S. 310, implicitly reject any role for the district courts beyond enforcing or denying enforcement of a summons. It places particular reliance on the Court's opinion in *LaSalle*, arguing that in balancing the various interests in that case, the Court did not regard issuance of a protective order "as a viable option." (Gov't Br. at 23). In our view, however, *LaSalle* is directly to the contrary.

LaSalle turned upon the fact that the civil and criminal investigatory and enforcement elements of the Internal Revenue Code "are inherently intertwined," 437 U.S. at 309, and that therefore in the context relevant to *LaSalle*, "it is unrealistic to attempt to build a partial information barrier between" the IRS and the Justice Department. *Id.* at 312. Accordingly, the Court held that once there has been a criminal tax referral to the Justice Department, the more severe prophylactic measure of prohibiting the IRS from using its summons power altogether is required. The Court so ruled despite the fact that "[t]he government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins." *Id.* at 311-12.

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35 Finally, judicial economy considerations more than balance any residual concern about delay. A post-disclosure civil suit under § 7431, necessitated by denial of a protective order, would require litigation not only of the same § 6103 issues which could have been decided by the district court in advance, but of additional issues such as damages and the good faith of the agent committing the violation. The result would be more time-consuming and distracting litigation and the expenditure of even more valuable judicial resources. *See United States* v. *Barrett*, 804 F.2d 1376, 1381 (5th Cir. 1986), *rev'd en banc*, 837 F.2d 1341 (5th Cir. 1988), *petition for cert. pending*, No. 87-1705 (Brown, J., concurring).

In contrast to *LaSalle*, it was neither unrealistic nor impractical for the district court in this case to prevent the IRS from disclosing the summoned records to Justice Department attorneys for use in defending non-tax civil litigation brought by the Church. Under Congress' tax scheme, there is no role for the sharing of information between the IRS and attorneys at the Justice Department involved in non-tax civil litigation. Indeed, the imposition of this kind of information barrier is precisely what Congress intended in enacting § 6103. Contrary to the government's assertion, therefore, *LaSalle* at a minimum implicitly suggests that the courts have the authority under § 7604(a) to restrict the IRS from making improper disclosures of summoned information.

In this case, the government's all or nothing approach would force the court to make an unnecessarily stark choice: it could, as in *LaSalle*, deny enforcement as a prophylactic measure despite the IRS's legitimate interest in unpaid taxes, or it could enforce the summons despite the abuse of its process and the violation of congressional policy which would result. Some lower courts, without considering the possibility of issuing protective orders, have suggested that denial of enforcement altogether is appropriate under these circumstances. For instance, in *United States* v. *Scholbe*, 664 F.2d 1163, 1167-68 (10th Cir. 1981), the Court held that the IRS "will retain its power to issue subpoenas" only if it "confines its sharing to the limits of I.R.C. § 6103." *Id.* at 1168. *United States* v. *Chemical Bank*, 593 F.2d 451, 455-58 (2d Cir. 1979), although relied upon by the government, is to the same effect. The court only enforced the summons in that case because the taxpayer had failed to submit any evidence indicating that the IRS intended to violate its own internal guidelines against improper disclosures, noting that it would "not anticipate that the Government will act unlawfully." *Id.* at 455. *See also United States* v. *Davis*, 636 F.2d 1028, 1036 n.7 (5th Cir. 1981) (noting enforcement was proper because no evidence presented that IRS had transmitted information to the DEA in violation of § 6103); *cf. United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1448 (10th Cir. 1985) (implying that sufficient past violations of

§ 6103, even in the absence of showing of intended future violations, may be "such an abuse as to invalidate the entire enforcement proceeding"). *But see United States* v. *Stuckey*, 646 F.2d 1369, 1375-76 (9th Cir. 1981) (indicating, although concurring and dissenting judges both disagreed on this point, that court would have enforced summons even if IRS had indicated it would disclose information without complying with § 6103 because it also had legitimate civil tax investigation purpose), *cert. denied*, 455 U.S. 942 (1982).

The government's point, on closer examination, is not that a court should either enforce or deny enforcement of a summons. Rather, it is that a summons should be enforced even if there is reason to believe that the IRS will disclose the summoned information in violation of § 6103 and even if the intended disclosure is unrelated to its investigation. There is no reason, however, for sacrificing either the taxpayer's congressionally protected interest in confidentiality or the government's interest in unpaid taxes. The simple expedient of a protective order can fully accommodate these otherwise conflicting interests.[36]

The government also misinterprets this Court's decision in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985). In that case, the IRS issued a "dual purpose summons" seeking information relevant to its investigation of the summoned party's tax liability as well as to its investigation of the tax liabilities of unnamed third parties. Both purposes, of course, were perfectly lawful. Had any of the information summoned been relevant only to the tax liabilities of the unnamed third parties, however, the IRS would have been required to comply with the "John Doe" provisions of the Code, § 7609(f), which require it to obtain an *ex parte* court order before issuing such a summons. *Id.* at 322-23. The Court found that since all of the summoned information was relevant to the investigation of the summoned party, the IRS could properly seek that information from it without complying with § 7609(f) as well. *Id.* Underlying its decision is the notion that the IRS may use any information which it has lawfully obtained in one investigation for any other *proper* purpose, such as, in *Tiffany*, determining the tax liabilities of third parties.

36 Indeed, in this case the district court held that it could issue a protective order, and that therefore the summons should be enforced even in the face of evidence that the IRS would improperly disclose summoned information. If this Court determines that the district court had no authority to issue an order protecting the interests of both the government and the taxpayer, then the case should be remanded to the district court so that it may consider whether enforcement of the summons should be denied.

The instant case, in contrast to *Tiffany*, is more properly characterized as a mixed *motive* case, where the district court had before it evidence of both legal and illegal motives. Contrary to the government's assertion, therefore, *Tiffany* in no way suggests that where the IRS summons information for both legitimate and *unlawful* purposes, the Court has no authority to issue a protective order prohibiting the IRS from carrying out its unlawful intent. The ability of the courts to prevent their process from being abused requires no less.

C. The Congressional Policy Against Disclosure Of Return Information Expressed In § 6103 Supports Rather Than Detracts From The Inherent Authority Of Courts To Prevent Improper Disclosures By Issuing Protective Orders

The enactment of § 6103 as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, reflected a broad congressional judgment against the unrestrained disclosure of information obtained by the IRS in enforcing the tax Code. Under the prior law, which permitted disclosure under regulations approved by the President or by Presidential order, Congress found that there had been "serious abuses of the rights of taxpayers," S.Rep. No. 94-938, 94th Cong. 2d Sess. 345, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3775, including the delivery of tax returns to the White House in an attempt "to use the Internal Revenue Service for political purposes." 122 Cong. Rec. 24013 (1976) (Remarks of Senator Dole); *see also* S. Rep. No. 94-938 at 317, 1976 U.S. Code Cong. & Ad. News 3746. Congress therefore acted "to strengthen taxpayers rights," S.Rep. No. 94-938 at 3, 1976 U.S. Code Cong. & Ad. News 3440, by providing rules relating to the confidentiality of tax returns, "an area where there has been

much abuse in the past." *Id.* at 19, 1976 U.S. Code Cong. & Ad. News 3455. *See also Barrett*, 837 F.2d at 1353-56 (Brown, J., dissenting); *Stokwitz* v. *United States*, 831 F.2d 893, 894-95 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1592 (1988); *Tierney* v. *Schweiker*, 718 F.2d 449, 455 (D.C. Cir. 1983).

The government concludes from the fact that Congress provided criminal penalties, § 7213(a), and a civil damages remedy, § 7431, for violations of § 6103 that Congress did not intend there to be general predisclosure injunctive relief for threatened violations of § 6103. From this it leaps to the conclusion that Congress intended to prohibit the courts from issuing protective orders in summons enforcement actions.

Although we disagree with the government's premise that predisclosure relief is unavailable, *see infra*, even if true, it is entirely irrelevant. A protective order, as issued by the court below, is not an injunction. Injunctive relief is granted in favor of the party invoking the court's process and only in accordance with the special requirements of Rule 65 of the Federal Rules of Civil Procedure. A protective order, in contrast, is issued against the very party seeking the court's aid. It is collateral to the main proceeding and is issued to prevent the court's process from being abused by a party obtaining relief. Whether issued pursuant to Rule 26(c) or the inherent power of the court, it is not subject to Rule 65, is not appealable under 28 U.S.C. § 1292(a)(1) as an injunction, and is not "an 'injunction' in the sense used in the federal statutes and rules." *International Products Corporation* v. *Koons*, 325 F.2d 403, 406 & n.3 (2d Cir. 1963) (Friendly, J.); *see also Bridge C.A.T. Scan Associates* v. *Technicare Corp.*, 710 F.2d 940, 943-44 (2d Cir. 1983). Accordingly, the question of whether or not Congress intended to authorize plenary actions for injunctive relief under § 6103 is simply irrelevant to the question of whether the federal courts retain their power to issue protective orders to prevent abuses of their process in summons enforcement actions.

Nor can the Court conclude that Congress intended to prohibit the issuance of protective orders in summons enforcement

proceedings from the fact that § 6103 is silent on this subject. Section 6103 does not purport to deal with the question of summons enforcement at all; it merely sets forth substantive rules governing when the IRS may or may not disclose taxpayer information. Its failure to address itself to the wholly separate question of the power of district courts to prevent abuses of their process in summons enforcement actions can hardly be deemed to be a congressional decision to limit the federal courts in the exercise of such a fundamental and inherent power. It would be extraordinary indeed had Congress intended to oust the courts of this power without any express indication of its intent. It must be presumed that when Congress legislates it is aware of the traditional inherent power of the courts and, in the absence of a clear direction to the contrary, intends to leave it intact. Here, moreover, the issuance of protective orders clearly supports rather than detracts from the legislative purpose.

The government's reliance on the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), is equally unavailing. As construed in the cases cited by the government, it prohibits taxpayers from maintaining affirmative suits for injunctive relief which interfere with ongoing IRS investigations. Since a protective order is not an injunction "in the sense used in the federal statues and rules," *Koons* at 406 n.3, nothing in the Act renders the courts powerless to issue protective orders to prevent their process from being used to further illegal activity.[37]

Furthermore, although it is unnecessary—and probably inappropriate—to resolve the issue here, we believe Congress did intend to provide for predisclosure relief to prevent violations of § 6103. There is no question that injunctive relief

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37 The government perceives an anomaly in placing taxpayers who challenge a summons in a preferred position to taxpayers who comply in the first instance with a summons or voluntarily produce records. Again, we disagree with the government's underlying premise, but even so assuming, we fail to see the anomaly. In a summons enforcement proceeding the IRS invokes the court's process in support of its investigation. The court must ensure therefore that its process is not abused. *Powell*, 379 U.S. at 58. It makes no difference that there may be other deserving parties not before the court who have not been afforded a remedy for the same wrong.

would further Congress' intent to prevent improper disclosures. Certainly, nothing in the sparse legislative history on this point suggests that predisclosure relief was not to be made available. The Senate Report indicated that the existing enforcement procedures were inadequate and that criminal penalties should be broadened and substantially stiffened. S.Rep. No. 94-938 at 347, 1976 U.S. Code Cong. & Ad. News 3777. It noted further that a civil damages remedy was being added "to aid in the enforcement of the confidentiality rules." *Id.* It did not indicate, however, that the damages remedy was intended to be exclusive.

Where Congress intended to provide exclusive remedies under the Tax Reform Act, it did so explicitly. Thus, section § 6110, enacted at the same time as § 6103, authorizes a taxpayer to file a predisclosure suit in the Tax Court, § 6110(f)(3), or a damages suit in the Court of Claims, § 6110(i), but further explicitly provides that such remedies shall be exclusive. § 6110(i) and (1). In contrast, § 6103, 7213(a) and 7431, although enacted at the same time, provide no indication that the post-disclosure criminal penalties and civil damages remedy are exclusive. We agree with the government that these provisions and § 6110 should be read *in pari materia*. Congress clearly knew how to indicate in unequivocal language that it intended to limit the availability of remedies not specified in these provisions. Its failure to do so in § 6103 therefore is a telling indication that it assumed other remedies, especially equitable remedies ordinarily within the inherent powers of the courts, would be available. *Cf. Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).[38]

38 If predisclosure relief is unavailable, then Congress left a significant gap in the enforcement of § 6103. Under § 7213(a), only willfull violations of § 6103 can result in criminal liability, and under § 7431(a), only knowing or negligent violations can result in civil liability. Thus, disclosures based on a good faith but erroneous interpretation of the law would be unrestrained, and without remedy, even where the taxpayer knows of the disclosure in advance. *See* § 7431(b) (expressly excepting such disclosures from civil liability). Given Congress' emphatic concern to protect the confidentiality of tax information, it seems highly doubtful that it intended this result.

The lower federal courts have so concluded in the few cases where predisclosure challenges were actually instituted. *See Tierney* v. *Schweiker*, 718 F.2d 449, 456-57 (D.C. Cir. 1983) (finding damages remedy inadequate and awarding predisclosure relief to Supplemental Security Income recipients to prevent IRS disclosures pursuant to consents coerced by the Social Security Administration); *Kemlon Products & Development Co.* v. *United States*, 638 F.2d 1315, 1321-23 (5th Cir. 1981) (declining to issue injunction against disclosures in furtherance of tax investigation because of Tax Anti-Injunction Act but implicitly indicating that injunctive relief would be available where, as here, the Act is inapplicable), *cert. denied*, 454 U.S. 863 (1981).

Injunctive relief is available, in any event, under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which provides for predisclosure judicial review of agency decisions to disclose information. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-18 (1979). In *Brown*, the agency notified Chrysler that it intended to disclose certain information, which Chrysler in turn claimed was confidential and protected by, *inter alia*, the Trade Secrets Act, 18 U.S.C. § 1905. The Court held that although no private right of action for injunctive relief could be implied under § 1905, *id.* at 316-317, judicial review was available under § 702 of the APA. *Id.* at 317-18.

There is no reason for a different result simply because the disclosing agency is the IRS. Although there is an exception to the APA where "statutes preclude judicial review," § 701(a)(1), there is a strong presumption in favor of judicial review which may be rebutted only upon a showing of clear and convincing evidence of a contrary legislative intent. *See, e.g., Traynor* v. *Turnage*, 108 S.Ct. 1372, 1378 (1988); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967). No such showing has been made here.[39] On the contrary, the availability

39 The Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), does not preclude judicial review here. As previously noted, whatever its outer bounda-

of judicial review can only further Congress' purpose to prevent the invasion of privacy and damage to the voluntary tax system which results from improper disclosures of tax information.

Nor does § 704 of the APA, which limits judicial review under the APA to "final agency action for which there is no other adequate remedy in a court," apply here. In order to prevent this language from defeating the central purpose of the APA to provide a broad spectrum of review of agency actions, this court narrowly construed § 704 only last term in *Bowen* v. *Massachusetts*, 108 S.Ct. 2722, 2736-37 (1988). In accordance with the provision's legislative history, the Court concluded that it was meant to preclude only " 'additional judicial remedies in situations where the Congress has provided special and adequate review procedures.' " *Id.* at 2736, *quoting*, Attorney General's Manual on the Administrative Procedure Act 101 (1947). At the time the APA was enacted, the Court explained, these kinds of special procedures existed for agencies such as the Federal Trade Commission and the National Labor Relations Board whose orders were directly appealable to the courts of appeal. In enacting the APA, Congress did not intend its "general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." 108 S.Ct. at 2737. Since these kinds of special procedures are clearly not applicable to review of IRS disclosure decisions, § 704 imposes no impediment to judicial review. *See also Commonwealth of Massachusetts* v. *Departmental Grant Appeals Board*, 815 F.2d 778, 784 (1st Cir. 1987); K. Davis, *Administrative Law Treatise*, § 26:11-26:12 (2d ed. 1983).

Thus, although we do not believe it is necessary for the Court to reach this issue, we nonetheless urge that predisclosure equitable relief to prevent violations of § 6103 should be available and that in any event judicial review of IRS disclosure decisions is available under the APA.

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ries may be, it is clearly inapplicable where the disclosure decision being reviewed is not a part of any IRS tax investigation. A decision that such a disclosure was not in accordance with law could in no way restrain the assessment or collection of taxes. *See* n.34, *supra*.

D. The Only Question Before This Court Is Whether The District Court Had Authority To Impose Any Limitations On The IRS's Disclosure Of The Summoned Information, Even Disclosures Unrelated To Its Investigation And In Violation of § 6103

The question on which the government sought and obtained *certiorari* in this case is whether a federal court has any authority whatsoever to issue a protective order against improper disclosures of the very records sought in a summons enforcement proceeding. If the Court finds that federal courts do have such power, at least to protect against disclosures concededly unrelated to legitimate tax investigations and in violation of § 6103, it need review the case no further. Either the court of appeals judgment should be affirmed, or the case should be remanded to the court of appeals for consideration of whether the district court's order properly conforms to the scope of its power as defined by this Court. The court of appeals may then consider whether technical modifications of the district court's order are required to specify that the IRS is restricted from disclosing the summoned records to Department of Justice attorneys representing the government in non-tax civil litigation with the Church.

CONCLUSION

For the reasons stated herein, respondents respectfully request that the judgment below be affirmed.

Respectfully submitted,

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